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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 105

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO Local Union No. 13-433, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 15-36) is reported at 264 F. 2d 649. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 12-52)[1] are reported at 117 NLRB 405; its supplemental decision (R. 52-56) at 119 NLRB 1681.

[1] The reference "R" is to the printed transcript of record filed with this Court.

JURISDICTION

The judgment of the court below was entered on April 27, 1959 (Pet. 37-38). The petition for a writ of certiorari was filed on June 10, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence on the record, as a whole supports the Board's finding that petitioner Union waived its right under a union security agreement to compel the discharge of an employee for non-payment of initiation fees and dues, where prior to the employee's discharge an agent of the Union accepted a belated tender of the initiation fee and dues.

2. Whether the Board, following issuance of its supplemental decision in this case, properly denied petitioner's motion to reopen the record for the purpose of taking additional evidence in view of the circumstances that, as petitioner has conceded, there was no serious disagreement with the Board's statement of the facts and no claim of prejudice is asserted.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix to this brief (*infra*, pp. 17-18).

STATEMENT

A. The Board's Findings of Fact

Briefly stated, the Union, acting under a lawful agreement requiring union membership as a condition of employment, demanded the discharge of employee Charles Hatfield for his failure to pay an initiation fee and dues. Thereafter, Hatfield tendered the initiation fee and dues, and James Gordon, a union shop steward, acting in his official capacity, accepted the tender. The Union repeated its discharge demand after the tender had been accepted, and the Company complied. The Board found that the acceptance of the tender by a union agent constituted a waiver by the Union of its right to demand Hatfield's discharge under its union security agreement for non-payment of dues. The facts upon which the Board's findings rest may be summarized as follows:

1. *The Union's first request for Hatfield's discharge*

Three employees, Charles Hatfield, Paul Thomas and Walter Spangle, none of whom had union membership, were hired by the Ralph L. Smith Lumber Company for the woods operation in October 1954. Late in November of that year, all three were informed by Robert Crimmins, the Union's business agent, that they had been employed for 30 days or more and must therefore, in accordance with the union shop contract, join the Union to retain their jobs. The three employees pointed out that the Company was about to shut down its woods operation

for the winter, and Crimmins agreed not to insist upon their joining the Union until their reemployment in the spring (R. 15-16; 194, 204, 206).

The woods operation reopened about the middle of March 1955 (R. 16; 116). However, no further request to join the Union was made of Hatfield, Thomas, or Spangle until May 5. On that date, Ernest Dickey, vice-president of the Union and its head steward in the woods, requested the three men to sign membership cards (R. 16; 157-158). Thomas and Spangle complied. Hatfield refused on the ground that he believed that he had signed such a card the preceding fall (R. 16; 158, 207).

Crimmins searched the union records and found that, so far as he could ascertain, Hatfield had neither applied for membership nor paid the necessary dues and initiation fee (R. 16-17; 213-214). On the following morning, Friday, May 6, Crimmins, without speaking to Hatfield, wrote the Company's general manager, Arthur B. Hood, requesting Hatfield's discharge for not having joined the Union (R. 17; 226, 195-196).

During the noon hour on Tuesday, May 10, Logging Superintendent Hansen told Hatfield, in the hearing of other employees, that he had heard a rumor that the Union intended to request Hatfield's discharge because he had not joined the organization. Hatfield said that he was perfectly willing to join. Upon being advised that he must see Dickey, the head woods steward at the camp, he said that it was difficult for him to get to the camp but that he would make every effort to do so (R. 18n; 176-177).

During the next three days, Hatfield made seven unsuccessful attempts to join the Union.

After quitting time on May 10, he went to the camp and tried unsuccessfully to find Dickey. When Dickey, who had gone fishing, returned to camp, he was told by Harvey Watson, the Union's recording secretary for the woods operation, that Hatfield had been looking for him in order "to sign a card to enter the union" (R. 18; 159).

At about 6:30 a.m., the following morning, May 11, Hatfield walked into the Company store and asked Johnston, the Company's timekeeper and storekeeper in the woods, to sign him "into the union." Johnston explained that he did not have authority to do this and suggested that Hatfield see Dickey (R. 18-19; 79-80). After work Hatfield went to Dickey's house but Dickey was not home. Hatfield then went to the Company store and asked Charles Holbert, a landing or side rod foreman, to inform Dickey that Hatfield had been looking for him and wished to join the Union (R. 19; 83).

During this period, Crimmins continued in his determination to have Hatfield discharged. During the morning of May 11, Logging Superintendent Hansen, who believed that Hatfield was sincere in his desire to join the Union, remarked to Crimmins that he (Hansen) would shortly have Hatfield either join the Union or pay the required dues. Crimmins replied that he had not enlisted the Company's aid in obtaining Hatfield's union membership and that in his letter of May 6, he had asked for Hatfield's discharge (R. 19; 199). That evening, at the regu-

lar monthly union meeting of the woods crew, Crimmins informed the group that Hatfield had failed to join the Union, and requested ratification of his written demand to the Company for Hatfield's discharge. Neither Dickey, who presided at the meeting, nor Watson, told the group that Hatfield had expressed a desire to join the Union and had attempted to see Dickey for this purpose (R. 161-162, 218). There is no indication that the group was aware that Crimmins had not spoken to Hatfield. The group ratified Crimmins' discharge demand on the basis that Crimmins reported to them (R. 20n; 161-162, 200, 218-219).

On the morning of May 12, just before the camp bus started for the woods, Hansen told Dickey that Hatfield was anxious to join the Union, and that he would like "to get the mess about [him] straightened out." Dickey told Hansen that the matter was out of his hands (R. 19; 178-179, 163-164). At about this time Hatfield saw Dickey sitting in the bus, hurried over to him, and asked him if he had any union cards which Hatfield could sign. The bus started before Dickey could reply (R. 19; 160). Hatfield thereupon returned to the Company store, and wrote and handed Johnston the following note (R. 20; 84-87, 233, 179-180):

> I have offered to join the Union as soon as the papers are offered me to sign I will do so.

Johnston turned this note over to Logging Superintendent Hansen (R. 86). Later in the day, Hatfield approached Dickey in the woods and asked Dickey

why he did not have the papers for him to sign. Dickey replied that the Union had had its crew meeting the preceding night, that everything was beyond his control at that time, and that he could not let Hatfield sign any cards (R. 20; 161).

2. *Union Steward Gordon's acceptance of Hatfield's membership application and checkoff authorization*

During the morning of May 13, James Gordon, the Shop Steward in the woods to whom Hatfield would normally have applied for union membership, but who had been hospitalized since May 2 (R. 187), returned to camp and walked into the store. Johnston discussed Hatfield's problem with Gordon, saying that he felt that the situation had been mishandled. Gordon agreed with Johnston and said that under the circumstances he would be willing to sign Hatfield "into the Union" (R. 21; 88, 89).

After Gordon had left, Johnston prepared the following letter for Hatfield's signature, addressed to the Company for the attention of Hansen (R. 21; 233-234, 89-90):

> Please find enclosed my authorization for the deduction of Union dues and initiation fees which have been signed by me this date to be considered as nunc-pro-tunc to 1 November 1954.
>
> You are authorized by me to make the deduction from my paycheck in accordance with the enclosed Union deduction slip.

When Gordon returned to the store a few hours later, Johnston showed him the letter, and they went to the woods to find Hatfield (R. 21; 90-91). Before

leaving for the woods, however, Gordon went to his house to obtain some union checkoff forms in order to "sign Hatfield into the Union" (R. 21-22; 91). The two men found Hatfield in the woods, and presented him with the letter, together with a union application card and a checkoff slip. Hatfield signed the several documents, and Gordon signed the application as subscribing witness over his official designation as "Job Steward, International Wood Workers of America, Local 13-433" (R. 22; 90-93, 193, 233, 100, 235, 189-190).

Later that afternoon, Hatfield told Gordon that he was sorry he had signed the checkoff slip authorizing the Company to deduct dues from November 1, 1954; because he had found that "the others were not paying back dues" (R. 22; 188).[2] Gordon thereupon destroyed the checkoff slip and prepared another authorizing the checkoff of initiation fee and current dues (R. 22; 234, 98-99). Hatfield signed it and it was then handed to Johnston as was customary (R. 22-23, 26-28; 188-189, 97-98).[3]

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[2] No deduction for union dues was made for Spangle or Thomas from November 1954 through April 1955 (R. 27-28; 122, 138-141).

[3] Sometime between May 13 and May 15, Johnston noted on the checkoff slip and on the company records that Hatfield's dues were to be deducted beginning with the payroll period commencing May 15 (R. 23; 97). This procedure was in accordance with custom (R. 23; 108-110). The dues of employees signing checkoff slips between the 1st and 15th of the month were normally deducted from the second of the two monthly pay periods (R. 23; 102-103, 123-130).

On the following day, Saturday, May 14, Gordon told Crimmins that he had "signed up" Hatfield, and attempted to turn over Hatfield's membership application card and the carbon copy of his checkoff slip (R. 23; 189-191). Crimmins, without challenging Gordon's authority, replied that he "wished" that Gordon had not signed up Hatfield because he had asked for Hatfield's dismissal, and told Gordon to keep the membership application card and the copy of the checkoff slip "for awhile" (*ibid.*).

3. *The Union's second demand for Hatfield's discharge and the Company's compliance*

On Monday, May 16, Crimmins wrote to the Company and, without mentioning either the union application card or the checkoff slip signed by Hatfield and retained by Gordon at Crimmins' request, stated that he had received a copy of Hatfield's so-called *nunc pro tunc* letter of May 13, that the procedure outlined therein was "illegal" and unacceptable to the Union, and that he again requested the Company to see that the Union's rights under the union shop clause of the contract were properly observed by the Company (R. 23-24; 227).

The Company complied with the request and discharged Hatfield on May 17 (R. 24; 174-175, 229-230). On May 20, the Company, at Hatfield's request, sent the Union a check for $23.50 to cover his initiation fees and dues for May (R. 24; 140-141, 150, 230-231). The check was returned by the Union with the information that Hatfield was not a member of the Union and was "not eligible" for membership (R. 24; 232, 222-224).

The Company reinstated Hatfield on July 14 (R. 24; 239). On July 21, Hatfield's attorney sent the Union a check for $30.50 to cover Hatfield's initiation fees and dues for April, May, and June 1955, stating that future dues would be deducted by the Company in the usual manner (R. 24; 239). The check was returned by the Union's attorney with the information that Hatfield was not eligible for Union membership (R. 25; 222-223). Subsequently, the Company discharged Hatfield for cause (R. 24; 181).

B. The Board's Conclusions and Order

In its first decision on the merits of this case, the Board held, in accordance with its ruling in *Technicolor Motion Picture Corp.*, 115 NLRB 1607, that the fact that Hatfield had tendered his initiation fee and dues to the shop steward prior to his discharge rendered his subsequent discharge for non-membership in the Union unlawful (R. 48-49). Thereafter, the court below set aside the Board's order in the *Technicolor* case, 248 F. 2d 348, stating that the mere fact of belated tender would not automatically protect an employee from discharge under a union-security agreement, and that the Board's failure in that case to discuss alternative grounds, such as the union's waiver of late tender, precluded the court from sustaining the order on any such alternative basis (248 F. 2d at 355-356).

The Board thereupon, on its own motion, reexamined its decision in this case in the light of the court's decision in *Technicolor*. Upon a reconsideration of the entire record, the Board issued a supple-

mental decision, reaffirming its decision that the Union violated Section 8(b)(2) and (1)(A) in causing Hatfield's discharge. In so holding, the Board announced that, with all respect to the court below, the Board was adhering to the views it had expressed in the *Technicolor* case. In addition, however, the Board expressly stated that as an independent ground for its result it found that the Union, through its authorized agent, Gordon, "accepted Hatfield's tender and thereby waived his asserted delinquency as a ground for discharge" (R. 54-56).

The Board ordered (R. 50-51) petitioner to cease and desist from violating Sections 8(b)(1)(A) and (2), to make Hatfield whole for any loss of wages he may have sustained as a result of the unfair labor practices, and to post appropriate notices.

Following issuance of the Board's supplemental decision, petitioner moved to reopen the record in the case for the purpose of adducing evidence assertedly bearing upon the Board's alternative theory of waiver. The Board denied the motion on the ground that "nothing has been presented that was not previously considered by the Board."

C. The Decision of the Court Below

The court below concluded (Pet. 30) that the "finding of the Board to the effect that the [petitioner] accepted Hatfield's tender and thereby waived his asserted delinquency as a ground for discharge, is * * * supported by the facts." Accordingly, it enforced the Board's order. The court also rejected petitioner's contention that it had been denied an

opportunity by the Board to offer further testimony going to the Board's alternative theory of waiver. The court stated (Pet. 33) that, in view of the fact that concededly there was no "serious disagreement" as to the underlying facts on the basis of which the Board had concluded that there had been a waiver of Hatfield's delinquency, "a reopening of the case before the Board would have added nothing substantial to [petitioner's] case."

ARGUMENT

1. The petitioner seeks, primarily, review of a question which we submit is not presented by this case in its present posture (Pet. 8-13). The Act makes it an unfair labor practice for an employer, or a union to cause an employer, to discharge an employee for non-membership in a union. The statute, however, permits an employer and a labor organization under conditions prescribed by the Act to enter into an agreement making union membership a condition of employment, and under such an agreement the union may insist upon the discharge of an employee for non-payment of dues or initiation fees within the grace period permitted by the Act and provided by the contract. Section 8(a)(3).

In construing the relevant statutory provision, the Board now holds that a union, which is party to such an agreement, loses its right to insist upon the discharge of an employee for non-payment of initiation fees or dues if prior to his actual discharge the employee makes a tender of the dues or initiation fee

even though a belated one.[4] *Technicolor Motion Picture Corp.*, 115 NLRB 1607. The court below has rejected this position and held that a belated tender, standing alone, is insufficient to protect the employee against discharge. *National Labor Relations Board* v. *Technicolor Motion Picture Corp.*, 248 F. 2d 348. In doing so, however, it stated that, in appropriate circumstances, "Either the employer or the union may by its actions be estopped from asserting its particular rights under the collective bargaining agreement." 248 F. 2d at 356. In the instant case, the Board, although adhering to its own views concerning the legal effect of a belated but unaccepted tender of dues, expressly advanced in its supplemental decision an alternative ground for the holding that Hatfield's discharge was violative of the Act, namely, "that the [Union] accepted Hatfield's tender and thereby waived his asserted delinquency as a ground for discharge" (*supra*, pp. 10-11). The court below affirmed this finding.

Accordingly, here, unlike the cases cited by petitioner (Pet. 9), the issue is not whether a union may insist upon the discharge of an employee for nonpayment of dues where the employee prior to his discharge makes a belated but unaccepted tender of the dues. The question is, rather, whether the Board and the court below properly found that acceptance of Hatfield's tender of initiation fee and dues prior to Crimmins' letter of May 16, 1955,

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[4] Originally, the Board held that a belated but unaccepted tender did not protect the employee against dismissal. *Chisholm-Ryder Co.*, 94 NLRB 508.

which resulted in Hatfield's discharge (*supra*, pp. 7-8, 9), constituted, in the circumstances of this case, a waiver of any right which the Union might otherwise have had to insist upon his discharge for nonpayment of fees and dues. The resolution of this issue turns largely upon the authority of the Union's agent, Gordon, who accepted Hatfield's tender, to bind the Union and presents no question warranting further review by this Court.

Gordon's status as a union agent with authority to sign up new employees is fully established by the record. As a job steward, it was his task to sign up employees and collect union dues (R. 191-192, 202-203). When Crimmins learned of Gordon's action in accepting Hatfield's membership application and checkoff slip, he did not question Gordon's authority to do so (*supra*, p. 9). In this setting and under established agency principles, the authority of Gordon to waive Hatfield's delinquency is clear. *Hall* v. *Union Indemnity Co.*, 61 F. 2d 85, 91 (C.A. 8), certiorari denied, 287 U.S. 663, and cases cited; 2 Am. Jur., *Agency*, Secs. 41-42, 44; 2 C.J.S., *Agency*, Sec. 77b.

Nor is there any basis for petitioner's suggestion (Pet. 3) that the grace period for the payment of fees and dues provided by the contract cannot be lengthened by an employee's unilateral tender after a demand for discharge.[5] This is simply another

[5] The Act provides that the grace period must be not less than 30 days following the beginning of employment or the effective date of the agreement whichever is later. Sec. 8 (a) (3).

way of saying that the union, which is party to the agreement, cannot waive the contractual grace period. But no reason appears that would preclude the union from waiving this contractual provision which is for its own benefit.

2. Equally insubstantial for purposes of certiorari is petitioner's further contention that it was improperly denied an opportunity by the Board "to present evidence" with respect to the alternative theory of the Board concerning the Union's waiver of Hatfield's delinquency (Pet. 13). As the court below noted (Pet. 33), there was, as petitioner conceded, "no serious disagreement with the Board's statement of the facts"; hence, "a reopening of the case before the Board would have added nothing substantial to [petitioner's] case." Petitioner had a full opportunity to present its views with respect to the correctness of the Board's alternative theory as a matter of law in the court below and it does not suggest that it has been prejudiced in any way by the procedure followed here. In these circumstances, further review is not warranted.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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JULY 1959.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C. 151, *et seq.*), are as follows:

Sec. 8.(a) It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; * * *.

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or termi-

nated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

Sec. 10. * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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